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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IX

RESERVATIONS TO TREATIES

Addendum

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Summary of the debate (continued)

1. With regard to draft guidelines 1.1.5 and 1.1.6, which deal with the problem of so-called "extensive" reservations, certain members pointed out that statements designed to increase the obligations of their author (as in the case of the South African statement concerning the General Agreement on Tariffs and Trade (GATT), which was cited by the Special Rapporteur[1]) were extremely rare; this type of statement could be either a proposal to extend a treaty, which could be accepted or not by the other States parties, or an interpretative statement, giving an extensive - even if erroneous - interpretation of the obligations of its author under the treaty. With regard to draft guideline 1.1.6, certain members noted that the draft guideline gave only an a contrario definition of reservations, particularly in the light of the principle of reciprocity, which is strictly applied in conventions, and that it was very similar to the general definition of reservations. Moreover, several members stated that it was impossible, strictly speaking, to "add a new provision to the treaty" by means of a simple unilateral statement.

2. Other members drew attention to the problems caused by the wording of both draft guideline 1.1.5 and draft guideline 1.1.6. Mention was made of a hypothetical case of a reservation to a particular treaty suspending the application of a general regime deriving from international law: such a reservation would revive the obligations deriving from general international law. On the other hand, in the case of a treaty that prohibited reservations but permitted statements of a "transitional" nature designed to limit the scope and nature of the obligations imposed by the treaty (as in the recent example of the Rome Statute establishing an International Criminal Court), it might be asked whether there were two regimes - one applicable to reservations and the other to statements - or whether there was only one option available to States. The opinion was also expressed that the two draft guidelines could be combined into a single guideline dealing mainly with the "modification" of the treaty itself (and not of its effects) by means of a statement that did not constitute a reservation. In the view of certain members, the problems raised by these two draft guidelines went far beyond simple drafting problems. Indeed, they were not convinced by the distinction made in draft guidelines 1.1.5 and 1.1.6 between unilateral statements that constitute reservations and those that do not. As far as the theory of law was concerned, there was no substantial difference between a statement limiting and a statement increasing the obligations imposed on their author. In this regard, the question was raised, since the Vienna definition refers only to "modifying", why one should exclude from the definition of reservations statements designed to increase the obligations of their author and which could, if the case arose, as a result of reciprocity, increase the obligations of the other parties as well.

3. Other members, on the other hand, believed that the two draft guidelines could be very useful in the Guide to Practice, since they dealt with statements designed to increase the obligations of their author and with statements designed to limit the obligations of their author, which therefore constituted reservations. While it was not necessary at the current stage to decide on the

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[1] A/CN.4/491/Add.3, para. 213.

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nature of the first type of statements (if, for example, they were governed by rules applicable to unilateral legal acts), the concept of reservations would thus be clarified. In this regard, the question was also raised of the possibility of substituting certain obligations under the treaty with others that were more or less equivalent.[2]

4. Summarizing the debate, the Special Rapporteur first stressed the true meaning of the terms used in the Vienna definition. It seems incorrect to state that a reservation can or cannot exclude provisions of a treaty or to maintain that the Vienna Conventions define reservations as limiting the legal effect of a treaty's provisions. "Modify" is the word used, hence the problem of extensive reservations.

5. Secondly, the Special Rapporteur said that he believed that statements designed to increase the obligations of their author constituted unilateral legal acts even if several members considered that the Commission should not take a decision on their nature at the current stage. His comment dealt with the question of whether a State could, by means of a reservation, increase the obligations of other States: according to the Special Rapporteur, two very different aspects must be distinguished:

(a) The first was to determine whether a reservation could increase the obligations of the parties normally deriving from the treaty. There is no doubt that this is the normal function of any reservation designed to neutralize certain provisions of the treaty;

(b) The second aspect concerns the possibility, for the reserving State, to increase the obligations of its contracting partners, not only with respect to the treaty but also with respect to general international law. It is hard to imagine that a State could modify customary international law to its benefit by making a reservation. It seems unreasonable to consider that a modifying "reservation" could increase the rights of the reserving State and the obligations of the other contracting States under customary international law; moreover, the designation of such practices as "reservations" would have very serious consequences for small underdeveloped States which, lacking highly organized legal services, would be deemed to have accepted such reservations after a certain period of time: they would also be bound by a sort of "legislation" that would be imposed on them from outside.

6. Thirdly, the Special Rapporteur noted that several unilateral statements called "reservations" by their authors (as, for example, Israel's reservation to the 1949 Geneva Conventions seeking to add the Star of David to the emblems of the Red Cross[3]) are in fact - whether designed to increase or to limit the

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[2] Mention was made of a reservation by Japan to the Food Aid Convention of 1971 (under which the contracting parties pledged to supply wheat to certain countries) by means of which Japan, not being a wheat producer, stated that it would supply a quantity of rice equivalent in "monetary" terms to the quantity of wheat that it would have had to supply.

[3] A/CN.4/491/Add.3, para. 225.

obligations of the other contracting States - proposals on amendment that enter into force only if they are accepted by the other parties. Given the tacit acceptance of reservations, the problem was to determine whether such "reservations" were true reservations.